Dynaserv Industries, Inc. *and* Local 68, International Union of Operating Engineers, AFL–CIO. Case 22–CA–17246

April 28, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On August 30, 1991, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dynaserv Industries, Inc., North Bergen, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Jeffrey Hill, Esq., for the General Counsel.
Larry Bray, Esq. (Israel & Bray), of New York, New York, for the Respondent.
Albert G. Kroll, Esq. (Raymond G. Heineman, Esq., on the brief), of Verona, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Dynaserv Industries, Inc.[1] (the Respondent) has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by having failed to honor requests by Local 68, International Union of Operating Engineers, AFL–CIO (the Union) to sign an agreed-on contract. The Respondent asserts that it never agreed to the terms and conditions contained in the Union's proposed contract and thus denies that its refusal to sign the proposal is an unfair labor practice.

[1] As amended at the hearing.

The hearing was held before me in Newark, New Jersey, on May 6, 1991. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION—LABOR ORGANIZATION

The Respondent is engaged in the business of providing janitorial services in commercial buildings. In its operations annually, it meets the National Labor Relations Board's indirect outflow standard for asserting jurisdiction.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

About 18 years ago, the Union represented employees of a company called 195 Broadway Corporation which provided janitorial services at various facilities in New Jersey owned by the American Telephone and Telegraph Company (AT&T) or by its subsidiaries. The negotiations for the successive collective-bargaining agreements for the janitorial employees of the 195 Broadway Corporation took place between officials of the Union and officials of AT&T. During the years between then and about 1988, other contractors replaced 195 Broadway Corporation at those locations. AT&T, however, continued to negotiate with the Union in establishing the rates of pay, and other terms and conditions of employment of the janitorial employees of those other contractors.

In 1988, AT&T ceased dealing directly with the Union. At that time, the principal janitorial contractor at the AT&T facilities involved was Tri-Maintenance. The Union, that year, negotiated with and reached agreement with Tri-Maintenance. There were then several janitorial contractors at the other AT&T facilities involved in this case. These other contractors signed agreements identical in terms to that which the Union had reached with Tri-Maintenance.

One of those other contractors was I.S.S. Energy Systems. It provided janitorial services at two AT&T locations in Piscataway, New Jersey, one on Kingsbridge Road and the other on Knightsbridge Road. Its contract with the Union was due to expire on March 1, 1990. However, effective June 1, 1989, AT&T awarded the custodial contract at those two facilities in Piscataway to the Respondent.

A few months before that effective date, the Respondent's president, Ronald Atkinson, telephoned Vincent Giblin, the Union's business manager, to inform him that the Respondent had been awarded the contract for those two AT&T facilities in Piscataway. Atkinson asked Giblin to meet to discuss the terms of a collective-bargaining agreement for the janitorial employees at those facilities. Giblin replied angrily that the Union was involved in litigation with AT&T, that there would be no negotiations, and that there was no reason to meet.

On May 24, 1989, Atkinson wrote Giblin and restated his offer to negotiate. In June 1989, a business representative of

the Union, Stephen McGuire,[2] met with Atkinson and with Respondent's labor counsel, Stanley Israel. In the course of that meeting, agreement was reached. Respondent accepted the same contract terms, with only minor modifications, that had been contained in the contract the Union had with I.S.S. Energy Systems. The agreement signed by the Respondent was scheduled to expire on February 28, 1990.

On December 15, 1989, the Union filed the requisite notices under Section 8(d) of the Act to terminate the contract on its expiration date and it requested the Respondent to negotiate a renewal agreement. It advised the Respondent that it will communicate with it soon to arrange for a meeting.

In fact, the Union did not get back to the Respondent until much later. Instead, in March 1990, the Union met with Tri-Maintenance, then the largest of the janitorial contractors, who had signed identical collective-bargaining agreements which also expired on February 28, 1990. In June 1990, the Union and Tri-Maintenance reached an accord on the terms of a renewal contract.

B. *The Discussions Between the Union and the Respondent as to a Renewal Agreement*

On June 13, 1990, McGuire met with the Respondent's president, Atkinson, and handed him a copy of the agreement that the Union had just reached with Tri-Maintenance. McGuire pointed out to Atkinson several differences between the contract that had expired on February 28, 1990, and the contract the Union had just negotiated with Tri-Maintenance. Those changes dealt with vacations, sick leave, starting pay rates, annuities, and hospital coverage. According to McGuire, Atkinson questioned only the language pertaining to hospital coverage, saying that it was vague.

McGuire testified in essence, and basically without contradiction, that Atkinson called him a couple of days later to point out that the contract language as to hospital insurance could be construed to require the employer to provide coverage for an employee's dependents and not just coverage of the employee alone. McGuire then reworded the clause in question to clarify that, if dependents are to be covered, the employee would have to pay for their coverage by having that cost deducted from his paycheck.

Atkinson testified that he had made only a cursory review of the contract given him on June 13 by McGuire and that he had been given to understand that there was to be some kind of a tradeoff in that the lower medical costs of the renewal contract would offset the wage increases and other additional costs provided for in the renewal contract.

Sometime in July or early July 1990, McGuire was informed that Tri-Maintenance, the largest subcontractor as noted above, had been replaced by Ogden Allied Services. In early July, McGuire met with Ogden Allied's vice president and with its labor relations adviser and they reached agreement on the same contract that Tri-Maintenance had signed, with one modification, the language change in hospital coverage discussed above.

McGuire then arranged to meet with Atkinson and the Respondent's labor counsel, Stanley Israel, on July 27, 1990. There is a conflict in the testimony as to what transpired then.

McGuire's account is as follows. They met for lunch. When they finished eating, McGuire gave Atkinson an unsigned copy of the agreement that he said the Union had reached with Ogden Allied. Atkinson asked if Ogden Allied had actually signed a renewal contract. McGuire told him it had and that he could provide him with a signed copy. When Atkinson told him that he just wanted the name of the person who signed it for Ogden Allied, McGuire informed him that Ogden Allied's vice president, named Canavan, had signed it. McGuire then pointed out to Atkinson and Israel the changes between that contract and the one that had expired on February 28, 1990. He noted that the increases in the agreement were not ''additional monies'' but were offset by the savings in the cost of the medical coverage—80 cents an hour vs. $1.25 under the expired contract. The Respondent's labor counsel took out a calculator, ''punched out some numbers'' and said to Atkinson that it was a better deal for him as the money was ''already in the budget.'' Israel quoted various percentage figures to Atkinson and mentioned those in connection with an unclear remark about Atkinson's ''cost back to ATT.'' Atkinson then asked Israel if he should sign a renewal agreement and Israel replied, ''sign it.'' McGuire asked Atkinson how long that would take. Atkinson replied that he would have to take the agreement back to his office to prepare his proposal for AT&T and indicated that the contract would be signed by the end of the following week. As they were leaving the restaurant, Atkinson told him that an employee's wife was expecting a baby in October, and that he was concerned that she might not be covered. McGuire told him that that could be worked out.

Atkinson was asked to testify as to what was said at the July 27 meeting. His response follows. He had the feeling that McGuire was not there to negotiate. He was told either then or in June 1989 that the contract was nonnegotiable. When McGuire gave him the contract on July 27, 1990, he noted that it was not signed. He, Atkinson, still had a problem with the language in the insurance section even though it had been made more specific. There was to be some sort of a tradeoff between the medical costs and the increases contained elsewhere. The changes were revised. He, Israel, and McGuire were working math problems back and forth. A number was arrived at that was finally acceptable. The economics had to be checked out and it is conceivable that there was ''a deal.''

When asked if Israel told him to sign an agreement with the Union, Atkinson responded that, not only does he not remember such a remark, but also that it is not like him to ask such a question.

Israel's testimony is that there were three prime subjects discussed—the medical program, the wage package, and the percentage increase and cost involved. He never ''instructed'' Atkinson to sign a renewal contract. He did state to Atkinson that ''all things being equal, it looked like a good deal.''

The evidence is uncontroverted that McGuire never heard from Atkinson after July 17, despite calling his office repeatedly to reach him. Atkinson's explanation for not answering those calls is that he understood that the Union had presented him with the contract as one that was nonnegotiable and,

[2] The surname appears as written in all three of the posthearing briefs that were filed and in an exhibit in evidence. The transcript's spelling, ''Maguire,'' thus appears to be phonetic.

since the economics did not check out, he saw no reason to respond to McGuire's calls.

McGuire telephoned Israel when his efforts to reach Atkinson proved fruitless. He testified that, during their discussion, he said to Israel that he thought that they had an agreement on July 27 and that, in response, Israel said ''so did I.'' Israel's testimony was that he could not recall the details of his discussion with McGuire and that he does not know if he used words which conveyed a message to McGuire that he too thought that a deal had been reached on July 27.

The Respondent has put into effect certain portions of the contract that McGuire gave Atkinson on July 27, 1990, including retroactive application of the wage package.

C. *Analysis*

I credit McGuire's account. His testimony struck me as forthright and candid. The testimony of Respondent's witnesses was too often conclusory. Atkinson's account was more an admixture of his feelings and of the discussions on June 13 and July 27, 1990. Moreover, the meeting on July 27, 1990, with Israel present paralleled the meeting these same individuals held a year earlier when accord was reached relatively quickly on the terms and conditions of the initial contract. Also, Atkinson's failure to respond to McGuire's repeated efforts to obtain his signature on the contract supports a finding that accord had been reached. See *Parkview Furniture Mfg. Co.*, 284 NLRB 947, 964 fn. 65 (1987). Atkinson's explanation, that he did not respond because he believed that the Union's proposals were nonnegotiable, strikes me as a patent afterthought. His further assertion that he did not indicate assent on July 27 because he had to ''check out the economics'' is also an afterthought. He had received a copy of that agreement a month previously and it seems unlikely that, in that interval, he never bothered to assess its cost. It appears too that the Respondent has put into effect major aspects, and perhaps the whole, of the ''economics.'' Atkinson's testimony, during cross-examination, establishes that a major cost item, the retroactive wage package, has been put into effect.

The Respondent notes in its brief that many substantive areas of the contract were not discussed at all or were only discussed in passing. It argues, from this, that no agreement on those matters was reached. That argument would have to be premised on a finding that the parties had agreed initially that the contract would not be effective until each item was discussed and until each item was separately agreed on. There is no such evidence before me. Rather, the record reveals that the parties, by their conduct, had understood that, for the most part, the contract would be virtually identical to one that was applicable to all employees who did custodial work at the AT&T facilities or former AT&T facilities. That is readily evident from Atkinson's asking for the name of the individual who signed the contract for Ogden Allied.

The Respondent also has urged that the fact that McGuire did not sign the contract at the luncheon meeting on July 27, 1990, makes clear that no agreement had been reached then. That argument overlooks Atkinson's expressed concern as to whether Ogden Allied had signed the same contract; it overlooks the obvious likelihood that the Respondent should have an opportunity to compare at length the contract it received on July 27 with the expired contract in order to assure itself that McGuire's representations that the only changes between them were those he had pointed out on July 27; Respondent's argument also overlooks the fact that the contract given Atkinson on July 27 contained lines to be signed by three other union officials besides McGuire.

I find that the parties had reached agreement on July 27, 1990, as to the terms and conditions of a renewal contract and that the Respondent has refused to honor the Union's repeated requests thereafter to sign the agreement which embodied those terms and conditions.

D. *The Motion, in the Alternative, to Amend the Complaint*

Just before the hearing was to be closed, General Counsel moved to amend the complaint to allege that, in the event it were found that accord had not been reached on July 27, 1990, the Respondent's failure to meet thereafter with the Union, for purposes of discussing the terms of a renewal contract, was violative of its duty to bargain collectively and thus an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act. In view of my findings above, it is unnecessary to rule on that motion. However, if the Board were to find that the parties had not reached an agreement on July 27, 1990, a ruling on the motion would be required. In that event, the motion should be denied for the following reasons.

The Respondent objected to the motion in view of its late filing and as it should have been accorded an opportunity to adduce evidence that it has met with the Union after July 27, 1990. General Counsel responded by asserting that the facts relied on in support of the motion had all been fully litigated and that no further hearing is necessary. The Union separately argues that evidence of meetings between the Union and the Respondent after July 27, 1990, relates to efforts to discuss settlement of the issues raised in the instant case and that such evidence is barred by Rule 408 of the Federal Rules of Evidence. Rule 408 bars evidence of offers of compromise to prove liability for or invalidity of a claim but does not bar evidence of such offer when proferred for another purpose. Rule 408 may well bar evidence of settlement discussions if offered to show that an accord had or had not been reached on July 27, 1990, but, if offered to establish that during the very settlement discussions, there was good-faith bargaining, evidence thereon might well be admissible. Of course, that would not directly address General Counsel's contention that the Respondent already had violated the Act by having ignored McGuire's repeated efforts to reach Atkinson.

The problem with General Counsel's position is that the record also reflects that the Respondent has effected changes in the wage rates of unit employees and made other contractual changes. There is no alternate contention that these changes were effected unilaterally. Presumably, the Union and the Respondent did have discussions thereon. The Respondent, thus, would have to be given an opportunity to adduce evidence as to how those discussions came about as such evidence might neutralize what would be a prima facie showing by General Counsel of an unlawful failure on Respondent's part to meet with the Union.

The time to raise the issue of such alleged failure is not at the end of a hearing and particularly not when the issue is presented by way of a motion which also would bar the Respondent from offering any defense it may have to the al-

leged violations set out in the motion itself. There is thus no merit in General Counsel's motion. See *Waldron, Inc.*, 282 NLRB 583 (1986).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act by having failed and refused to honor the requests of the Union to execute a collective-bargaining agreement containing the wage, hours, and other terms and conditions of employment of all custodial, maintenance, and related categories of employees employed by the Respondent at 60 Kingsbridge Road and also at 30 Knightsbridge Road, in Piscataway, New Jersey, on which it had reached an accord with the Union on July 27, 1990.

4. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Respondent be ordered to execute the copy of the collective-bargaining agreement given it by the Respondent on July 27, 1990, and to give effect to all terms and provisions thereof, retroactive to March 1, 1990. The Respondent shall make whole any monetary loss suffered by any of the employees covered by that agreement, in accordance with the formula set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Dynaserv Industries, Inc., North Bergen, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Local 68, International Union of Operating Engineers, AFL–CIO as the exclusive representative of all custodial, maintenance, and related categories of employees employed by the Respondent at 60 Kingsbridge Road and also at 30 Knightsbridge Road, Piscataway, New Jersey, by refusing the requests of that labor organization to sign a copy of the collective-bargaining agreement given it on July 27, 1990.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Sign the copy of the agreement referred to above and deliver the executed copy to the aforesaid labor organization.

(b) Make whole any employee covered by the agreement referred to above, for all losses incurred by reason of the failure of Respondent to sign and honor the agreement, with interest thereon computed in the manner set forth in the remedy section above.

(c) Post at its places of business where notices to the employees employed at the facilities described above are customarily posted copies of the attached notice marked ''Appendix.''[4] Copies of the notice on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places at these locations, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 68, International Union of Operating Engineers, AFL–CIO by refusing to execute a collective-bargaining contract negotiated and agreed on with it.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL sign the collective-bargaining agreement given us on July 27, 1990, by the above-named Union as we had agreed to sign it then and WE WILL deliver the signed agreement to the Union as it has requested us to do.

WE WILL make whole, with interest, any employee who suffered a loss by reason of our failing to sign and give effect to the collective-bargaining agreement referred to above.

DYNASERV INDUSTRIES, INC.